UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	)	05-CV-0329 GKF-SAJ **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER AMENDED SCHEDULING ORDER**

Defendants jointly submit this Response in opposition to Plaintiffs' Motion to Reconsider Amended Scheduling Order. (Dkt. No. 1386.) In September 2007, the Cargill Defendants moved this Court to extend and modify the dates in the Scheduling Order of March 9, 2007. (Dkt. No. 1297.) Before that motion, Plaintiffs refused to consent to any modification whatsoever of the schedule. However, in their response, Plaintiffs actually requested an across-the-board extension of eight months. (Dkt. No. 1322 at 1.) Given that Plaintiffs asserted their own proposed amended schedule, this Court deemed the response a motion to amend the schedule. (Order of Nov. 15, 2007: Dkt. No. 1376 at 1-2.)

Now, Plaintiffs improperly seek reconsideration of the Court's Amended Scheduling Order (Dkt. No. 1376) by reasserting their previously denied request to expand the scope of the expert reports on damages. Plaintiffs also seek two additional types of scheduling relief: (1) a special 60-day Plaintiffs-only extension of expert discovery and (2) additional time between the discovery and dispositive motion deadlines. (Dkt. No. 1386.) Plaintiffs offer no explanation of why they omitted these requests from their original submissions and arguments, and in any event Plaintiffs' requests are meritless.

I. ARGUMENT

Plaintiffs' motion cites no law or authority suggesting that they meet the Tenth Circuit's standard for a motion to reconsider. (See id.) In fact, that law is dispositive of Plaintiffs' motion. The Court should not reach the merits of Plaintiffs' motion because each proposed scheduling change either was or well could have been raised in the underlying briefing. The law of this Circuit – resting on basic principles of justice and finality – prevents Plaintiffs from an unfair second bite at this apple. Even if the Court were to address the merits of Plaintiffs' motion, however, their proposed amendments should be rejected.

A. All Requests Either Were Raised or Could Have Been Raised in Plaintiffs' Earlier Briefing on Amending the Pretrial Schedule.

The Tenth Circuit directs that courts should disregard all reconsideration arguments that were or could have been raised in the initial briefing, which encompasses all of Plaintiffs' arguments here. A motion for reconsideration that simply reasserts previously addressed arguments or "advanc[es] new arguments or supporting facts which were otherwise available for presentation" when the original motion was made is improper and must fail. Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991). The Tenth Circuit more recently explained that although a motion to reconsider may be proper where the "court has misapprehended the facts, a party's position, or the controlling law," such a motion "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000); see also Cargill Defs.' June 18, 2007 Resp. to Pls.' Mot. to Reconsider Order Compelling Discovery: Dkt. No. 1189 at 2 (discussing same case law).

Here, Plaintiffs do not even allege that the Court misapprehended facts or law. Instead, Plaintiffs seek rehearing of a fully argued issue and raise two other scheduling issues that could

and should have been raised in their initial proposed schedule. The Court should deny the motion on this ground alone, see Van Skiver, 952 F.2d at 1243, particularly in light of their failure to address or even acknowledge the controlling law.

B. Plaintiffs' Motion Fails on Its Merits.

Should this Court decide to address the merits of Plaintiffs' motion to reconsider, it should nonetheless deny the motion in its entirety.

1. This Court Should Stand by it Use of Standard, Clear Language Regarding Expert Reports.

Plaintiffs' motion to reconsider renews their odd request that the Court should change the well-established designation of the parties' expert reports on injury, causation, and all other issues except damages to the unusual designation of "non-relief-related reports" and the expert reports on damages to "relief-related reports." (See Dkt. No. 1386 at 1-4.) Although Plaintiffs couch their request in part as a request for "clarification," they nevertheless simply repeat the same invitation that the Defendants addressed and the Court declined in its original Order. (See id. at 1-2 (quoting at length from Plaintiffs' original response brief at Dkt. No. 1322).) Plaintiffs also all but admit that they now wish they had not requested the proposed scheduling order amendments that they did. (Id. at 4: (stating that the resulting schedule was not what Plaintiffs "wish[ed] when it made its suggestions concerning this manner of case organization.")) Plaintiffs offer no new facts or law in support of this request,[1] and do not claim that the Court

[1] The only "fact" that Plaintiffs arguably assert in this respect is their filing of expert affidavits in support of their motion for preliminary injunction. (See Dkt. No. 1386 at 3.) However, this information was known to Plaintiffs at the time they argued for modifications to the scheduling order. One of Plaintiffs' supporting expert affidavits was executed nearly two weeks before the November 6, 2007 hearing, see Aff. of Roger L. Olsen (10/26/07) (Dkt No. 1373-18), and three others were executed just after the hearing. See Affs. of Lowell Caneday, Gordon V. Johnson, and Valerie Harwood (all 11/8/07) (Dkt. Nos. 1373-5, 1373-17, 1373-19).

misapprehended any arguments or facts previously asserted. This question was fully argued by all sides and is not appropriate for reconsideration.

With respect to the merits of Plaintiffs' attempt to redefine the parties' experts, as the Cargill Defendants noted in their previous reply, the Court's Scheduling Orders (old and new) employ standard, unambiguous language, and Plaintiffs' vague alternative would serve to introduce confusion and ambiguity. As the Cargill Defendants observed:

> If Plaintiffs intend to suggest that the Court should alter the substance of the parties' disclosure obligations on these respective deadlines, they should say so and state what they believe those new obligations should be. Absent such a suggestion, however, the Court should reject the requested change in language.

(Dkt. No. 1344 at 10, emphasis in original.) Plaintiffs provided no such statement. Indeed, even in their present motion, Plaintiffs do not identify how they intend to draw the line between "relief-related" experts and "non-relief-related" experts and give no examples of particular aspects of expert opinion that would fall into one category or another. In the absence of such definition, and given the history of this case, Plaintiffs' proposed changes would inevitably generate further disputes about what the relabeled deadlines actually mean and whether one party or another has complied with the Court's requirements. "Damages expert" has a clear and well-understood meaning, and this Court should not promote confusion by altering it.

Plaintiffs' motion suggests that this issue was not fully developed in the underlying arguments, overlooking the lengthy discussion of the issue at the November 6, 2007 hearing. (See Dkt. No. 1386 at 2: (noting that the Cargill Defendants "respond[ed] to the issue in their Reply, simply urging the Court to deny" the request, and claiming that "[t]he Amended Scheduling Order did not address this issue.")) After the Cargill Defendants argued the issue, counsel Scott McDaniel described Defendant Peterson Farms's concerns with Plaintiffs' proposed language change:

> This question of changing the second benchmark to relief, it concerns me greatly, Your Honor. That's because the plaintiffs both through pleading and through discovery responses have indicated they're pursuing a number of forms of relief. Monetary damage, an order abating the use of litter, an order to remediate the alleged injured natural resources, an order to pay for the costs of replacing alleged injured natural resources, … possibly an order directing that there be some sort of future study in monitoring in the watershed.
>
> And if you call that second benchmark, Your Honor, anything but damages, I think it's going to create ambiguity where none currently exists at least in the wording of the scheduling order. And you can imagine that the defendants are skeptical of the plaintiff's desire to change it for all these reasons we've described. If that language is employed, as Mr. Ehrich says, does that mean they can produce a natural resource damage assessment or remediation plan and we have a month to respond? If … the Court adopts their language, if an expert submits an opinion about entirely new litter management protocols different than the laws of the two states, will the defendants only have a month to respond?
>
> So, I would submit to you Your Honor the only thing that makes sense is to limit that second benchmark to what it says and that is monetary damages.

(Nov. 6, 2007 Hrg. Tr.: Dkt. No. 1387 at 176:5 – 177:5.) In rebuttal, Plaintiffs' counsel Louis Bullock argued that Plaintiffs' requested change in the names of the expert reports was:

> trying to get at is that in the first phase of experts, what we would submit is our -- the causation piece and the injuries … the basics of fate and transport, the basics of … what injuries have resulted from this contamination.
>
> The second phase would be looking at damages and remedies. Damages are not, as the Court is well aware, a stand alone piece. Damages change according to how you design the remedies. And you can't really begin designing the remedies until you know what the injuries are. And so, it doesn't really make sense, that is unless you're a defendant and you want to be sure that plaintiff doesn't have a chance to really look at the injuries and then design a remedy, to say you're going to do the remedies at the same time that you do the injuries. Until you get the injuries you really can't start on the remedy work.

(Id. at 195:5-21.) To which this Court responded: "You [could] always assume that damages meant quantification of the monetary damage which would []come after the discussion of the injury, of course." (Id. at 195:22-24.) Mr. Bullock agreed with the Court, but then retorted that

part of the question is "what can be accomplished by, for instance, injunctive relief so that what amount of -- what is left to be compensated in the way of damages [sic]." (Id. at 195:25 – 196:4.) Mr. Bullock concluded: "Until you get that complex picture together into one place, you're really taking it in divisions which are very artificial and do not recognize their interplay." (Id. at 196:5-7.) With that, the Court found that issue submitted. (Id. at 196:8-9.) In sum, Plaintiffs previously presented and the Court fully considered the very issue and arguments Plaintiffs raise again here.

Plaintiffs' persistence and aggressiveness in pursuing this change in language is both puzzling and troubling. Of particular concern in considering Plaintiffs' proposed "relief-related" regime is the possibility that Plaintiffs would try to produce a CERCLA remediation plan or a natural resource damages ("NRD") assessment only at the second expert deadline, claiming that the plan or assessment was "relief-related" and leaving Defendants only two months to respond. If that is what Plaintiffs mean by their nomenclature request, they should directly say so and provide support.

Similarly, the doggedness of their efforts suggests that Plaintiffs may intend a backdoor claim for injunctive relief under Count 2 for CERCLA NRD. The law is clear, however, that NRD claims under CERCLA may seek only monetary relief, and not injunctive relief.[2] If Plaintiffs in fact intend to challenge this longstanding statutory interpretation and seek injunctive

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[2] For example, the Department of Interior regulations for CERCLA define damages to mean "the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA." 43 C.F.R. § 11.14(l); see also 43 C.F.R. § 11.80(b) (explaining that the purpose of the damage determination phase is "to establish the amount of money to be sought in compensation for injuries to natural resources resulting from a discharge of oil or release of a hazardous substance.").

relief for NRD under CERCLA, they should do so directly and with supporting analysis and legal authorities, not through the guise of a language change in a scheduling order.

This discrete matter was briefed and fully argued before the Court. Upon due consideration, this Court correctly let stand its original language that expert report phases be for "all Issues Except Damages" and "Damages." (Order of Nov. 15, 2007: Dkt. No. 1376 at 2.) The Court found for Defendants rather than Plaintiffs on that issue—nothing has changed, and no clarification of that ruling is necessary. The Court's ruling was and is sound, and Plaintiffs offer no valid reason for the Court to change it.

2. The Court Should Reject a "Plaintiffs Only" Discovery Period.

For their second requested modification to the Amended Schedule, Plaintiffs apparently argue that they should receive an extra discovery period unavailable to Defendants. (See Dkt. No. 1386 at 4-5.) Aside from Plaintiffs' unexplained failure to raise this argument in their original briefing, see Van Skiver, 952 F.2d at 1243, the Court should deny the request on its merits as lacking in basic fairness.

In their original motion, Plaintiffs requested 30 days between Defendants' damages experts' reports and the close of discovery, during which time presumably all parties could engage in discovery. (Dkt. No. 1322 at 13.) The Court rejected that proposal and set the two deadlines on the same date, March 2, 2009. Plaintiffs now "suggest" that the Court amend the Scheduling Order "to allow Plaintiff 60 days to complete its discovery related to Defendants' final expert reports." (Id. at 4-5.) Plaintiffs specify that "all other discovery" should still be due by March 2, 2009. (Id. at 5.) Such a Plaintiffs-only extension of expert discovery would be fundamentally unfair, and Plaintiffs offer no authority to support it. (See id. at 4-5.) If the Court were to make any modification of the discovery deadlines, the time allowed should be equal for all parties.

3. The Dispositive Motion Deadline Need Not Be Altered.

Plaintiffs' final proposed amendment to the schedule is found in a footnote on the last page of their motion to reconsider. (Dkt. No. 1386 at 5 n.1.) Without supporting argument, explanations, or authorities, Plaintiffs suggest that the Court move the dispositive motion deadline from April 2 to May 15, 2009 to account for their request for additional Plaintiffs-only discovery into Defendants' expert damages reports. Defendants defer to the Court's discretion on this issue, which of course depends on the Court's ruling on Plaintiffs' requested discovery extension.

II. CONCLUSION

For all the above reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion To Reconsider Amended Scheduling Order.

Respectfully submitted,

Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC

BY: s/ John H. Tucker, OBA #9110

JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: 918/582-1173
Facsimile: 918/592-3390

And

DELMAR R. EHRICH
BRUCE JONES
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: 612/766-7000
Facsimile: 612/766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION LLC

BY: /s/Robert W George
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
ROBERT W. GEORGE, OBA #18562
ERIN WALKER THOMPSON, Arkansas Bar No. 2005250
KUTAK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
Telephone: (479) 973-4200
Facsimile: (479) 973-0007
-AND-
STEPHEN L. JANTZEN, OBA # 16247
PATRICK M. RYAN, OBA #7864
PAULA M. BUCHWALD, OBA #20464
RYAN, WIALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766
E-Mail: sjantzen@ryanwhaley.com
-AND
THOMAS C. GREEN, ESQ.
MARK D. HOPSON, ESQ.
TIMOTHY K. WEBSTER, ESQ.
JAY T. JORGENSEN, ESQ.
SIBLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202)736-8711
ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC; AND COBB-VANTRESS, INC.

BY: /s/ A. Scott McDaniel
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
A. SCOTT MCDANIEL, OBA#16460
CHRIS A. PAUL, OBA #14416
NICOLE LONGWELL, OBA #18771
PHILIP D. HIXON, OBA #19121
McDaniel, Hixon, Longwell & Acord, PLLC
320 S. Boston Avenue
Suite 700
Tulsa, OK 74103
-AND-
SHERRY P. BARTLEY, AR BAR #79009
MITCHELL WILLIAMS, SELIG, GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
ATTORNEYS FOR PETERSON FARMS, INC.

BY: /s/ R. Thomas Lay
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
R. THOMAS LAY, OBA #5297
KERR, IRVINE, RHODES & ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
-AND-
JENNIFER S. GRIFFIN
LATHROP & GAGE, L.C.
314 East High Street
Jefferson City, MO 65101
ATTORNEYS FOR WILLOW BROOK FOODS, INC.

BY: /s/ Randall E. Rose
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
RANDALL E. ROSE, OBA #7753
GEORGE W. OWENS, ESQ.
OWENS LAW F P.C.
234W. 13 Street
Tulsa, OK 74119
-AND-
JAMES MARTIN GRAVES, ESQ.

GARY V. WEEKS, ESQ.
BASSETT LAW FIRM
POB 3618
Fayetteville, AR 72702-3618
ATTORNEYS FOR GEORGE'S, INC. AND GEORGE'S FARMS, INC.

BY: /s/John R. Elrod
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
JOHN R. ELROD
VICKI BRONSON, OBA #20574
BRUCE WAYNE FREEMAN
CONNER & WINTERS, L.L.P.
100 W. Central Street, Suite 200
Fayetteville, AR 72701
ATTORNEYS FOR SIMMONS FOODS, INC.

BY: /s/ Robert P. Redemann
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
ROBERT P. REDEMANN, OBA #7454
LAWRENCE W. ZERINGUE, ESQ.
DAVID C. SENGER, OBA #18830
PERR1NE, MCGIVERN, REDEMANN, REID, BARRY &
TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
-AND-
ROBERT E. SANDERS
STEPHEN WILLIAMS
YOUNG, WILLIAMS, HENDERSON & FUSILIER
Post Office Box 23059
Jackson, MS 39225-3059
ATTORNEYS FOR CAL-MAINE FARMS, INC. AND CAL-MAINE FOODS, INC.

CERTIFICATE OF SERVICE

I certify that on the 21st day of December, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General — drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General — kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General — trevor_hammons@oag.state.ok.us
Robert D. Singletary — Robert_singletary@oag.state.ok.us
Daniel Lennington, Assistant Attorney General — Daniel.lennington@oag.ok.gov

Douglas Allen Wilson — doug_wilson@riggsabney.com
Melvin David Riggs — driggs@riggsabney.com
Richard T. Garren — rgarren@riggsabney.com
Sharon K. Weaver — sweaver@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis

Robert Allen Nance — rnance@riggsabney.com
Dorothy Sharon Gentry — sgentry@riggsabney.com
Riggs Abney

J. Randall Miller — rmiller@mkblaw.net
Louis W. Bullock — lbullock@mkblaw.net
Miller Keffer & Bullock

David P. Page — dpage@edbelllaw.com
Bell Legal Group

William H. Narwold — bnarwold@motleyrice.com
Elizabeth C. Ward — lward@motleyrice.com
Frederick C. Baker — fbaker@motleyrice.com
Lee M. Heath — lheath@motleyrice.com
Elizabeth Claire Xidis — cxidis@motleyrice.com
Motley Rice
COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen — sjantzen@ryanwhaley.com
Paula M. Buchwald — pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.

Mark D. Hopson — mhopson@sidley.com
Jay Thomas Jorgensen — jjorgensen@sidley.com
Timothy K. Webster — twebster@sidley.com
Sidley Austin LLP

Robert W. George — robert.george@kutakrock.com
Michael R. Bond — michael.bond@kutakrock.com
Erin W. Thompson — erin.thompson@kutakrock.com
Kutack Rock LLP

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay — rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin — jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann — rredemann@pmrlaw.net
Lawrence W. Zeringue — lzeringue@pmrlaw.net
David C .Senger — dsenger@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders — rsanders@youngwilliams.com
E. Stephen Williams — steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens — gwo@owenslawfirmpc.com
Randall E. Rose — rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves — jgraves@bassettlawfirm.com
Gary V. Weeks
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod — jelrod@cwlaw.com
Vicki Bronson — vbronson@cwlaw.com
Bruce W. Freeman — bfreeman@cwlaw.com
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel — smcdaniel@mhla-law.com
Nicole M. Longwell — nlongwell@mhla-law.com
Philip D. Hixon — phixon@mhla-law.com
Craig Mirkes — cmirkes@mhla-law.com
McDaniel, Hixon, Longwell & Acord, PLLC
Sherry P. Bartley — sbartley@mwsgw.com
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

Michael D. Graves — mgraves@hallestill.com
Dale Kenyon Williams, Jr. — kwilliams@hallestill.com
COUNSEL FOR CERTAIN POULTRY GROWERS

Charles Livingston Moulton — Charles.Mouton@arkansasag.gov
Arkansas Natural Resources Commission

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

s/ John H. Tucker